

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

DONALD YORK EVANS, et al.,

Plaintiffs,

vs.

HOWARD SKOLNIK, et al.,

Defendants.

3:08-CV-0353-GMN (VPC)

ORDER

Before the court is the motion of defendants, Howard Skolnik, Don Helling, William Donat, Brian Henley, and Lea Baker (“defendants”) for case terminating sanctions (#190). Plaintiff, Donald York Evans, (“Mr. Evans”) opposed (#192) and defendants replied (#196).

I. Procedural History

On June 26, 2008, John Witherow (“Mr. Witherow”), an inmate incarcerated at the Nevada State Prison during the events giving rise to his complaint, and his attorney, Mr. Evans, filed a complaint alleging that prison officials and defendant, Inmate Calling Solutions (“ICS”), improperly monitored attorney-client phone telephone calls in violation of constitutional and federal statutory rights (#2). In December 2008, plaintiffs filed a first amended complaint (“FAC”) adding Global Tel Link Corporation (“GTL”) and Embarq Pay Phone Services, Inc. (“Embarq”) as parties (#33). Mr. Evans dismissed his claims against ICS with prejudice (#62), and the court later granted GTL’s and Embarq’s motions to dismiss as to Mr. Evans (#117; 122). The court also granted the motions of ICS, GTL, and Embarq to dismiss as to Mr. Witherow. *Id.* The only remaining defendants are employees of the Nevada Department of Corrections (“NDOC”).

At a February 9, 2010 status conference (#148), Mr. Evans, through his then counsel, Marc Picker, Esq., advised that he was proceeding under the first amended complaint (#33). Mr. Witherow, who by this time represented himself *in pro se*, advised that he was proceeding under the second

1 amended complaint (#80).¹ On March 8, 2010, this court granted Mr. Evans's motion to substitute
2 James Andre Boles, Esq. as his counsel (#155). The parties proposed a second amended discovery plan
3 and scheduling order, which the court approved with the caveat that discovery would be completed by
4 September 13, 2010, and that no extensions would be granted (#164). However, on August 2, 2010, Mr.
5 Witherow asked for an additional 180 days for discovery for leave to file a proposed third amended
6 complaint (#169). The court granted a brief extension of time to complete written discovery and take
7 depositions, and set a final discovery cutoff of October 28, 2010, but denied leave to file a third amended
8 complaint (#175). The court emphasized that no further extensions of discovery would be granted. *Id.*

9 On August 10, 2010, defendants served Mr. Evans with a request for production of documents
10 and three sets of interrogatories propounded by defendants Skolnik, Helling, and Henley (#184, Exs. B,
11 C, D & E). Mr. Boles and Mr. Evans agreed that Mr. Evans could speak directly with Mr. Simon,
12 defendants' counsel, about the pending discovery, and on August 26, 2010, Mr. Evans and defendants'
13 counsel did so (#184, Ex. A). Messrs. Simon and Evans agreed that to the extent Mr. Evans's responses
14 to interrogatories required an identical response from one defendant, Mr. Evans could refer to that earlier
15 response. *Id.* On September 15, 2010, Mr. Simon received Mr. Evans's responses to discovery. *Id.*

16 As to Mr. Evans's response to request for production of documents Nos. 1, 2, 4, 7, 8, 9, 10, 11,
17 12, 13, 14, 15, 16, 17, 18, 19, and 20, Mr. Simon gave Mr. Evans an additional thirty days to respond,
18 but that deadline passed with no response (#184-2, Ex. F). Three days before the October 28, 2010,
19 discovery cutoff deadline, Mr. Simon sent a meet-and-confer letter to Mr. Boles and told him that more
20 than forty days had passed without any response at all. *Id.* In response to the remaining document
21 requests, Mr. Evans interposed the attorney-client privilege and a general claim of confidentiality. *Id.*
22 Mr. Simon correctly pointed out in his letter that since the plaintiffs' claims concern interception of
23 privileged communications, they had put the subject matter at issue; therefore, the privilege was waived.
24 *Id.*

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27 ¹Cal Potter, Esq. now represents Mr. Witherow (#195).
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1 Mr. Simon further noted that Mr. Evans had simply failed to answer any of the interrogatories
2 Messrs. Skolnik and Henley propounded. *Id.* Finally, the answers to Mr. Helling's interrogatories were
3 unresponsive, incomplete, and cited to prior answers that had nothing to do with the interrogatory posed.
4 *Id.* In light of the October 28, 2010, discovery deadline, Mr. Simon asked for a response by November
5 3, 2010. *Id.* Mr. Simon followed his letter with a telephone call to Mr. Boles on November 3, 2010, but
6 was told that Mr. Boles was out of the office for the balance of the week. *Id.* Mr. Simon left a message
7 asking Mr. Boles to return his call, but never heard from him. *Id.* According to Mr. Simon, Mr. Boles's
8 lack of communication was a regular pattern as Mr. Boles failed to respond to three prior letters, and five
9 phone messages over the weeks leading up to the close of discovery. *Id.* Messrs. Boles and Simon last
10 spoke at Mr. Evans's October 27, 2010 deposition. *Id.* On November 5, 2010, Mr. Simon filed his
11 motion to compel and for sanctions (#184), and the motion was set for hearing on December 1, 2010
12 (#188).

13 Mr. Boles filed no response to the motion to compel, but appeared telephonically for the hearing.
14 Mr. Boles told the court that he had not received the motion to compel, that Mr. Simon never contacted
15 him for a meet-and-confer, and that he had no clue about the nature of the discovery dispute. However,
16 the court noted that the certificate of service of the motion evidenced it was mailed to Mr. Boles's law
17 office, and the motion was also docketed on PACER. Moreover, Mr. Simon's declaration and exhibits
18 in support of the motion detailed his efforts to meet and confer with Mr. Boles without success. The
19 court granted the motion to compel and for sanctions and directed that documents responsive to Request
20 Nos. 1, 2, 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20 be produced by the close of business
21 on December 8, 2010, and noted that any objections to their production were deemed waived (#188).
22 The court ordered the same deadline to answer the interrogatories propounded by Messrs. Skolnik and
23 Henley, which Mr. Evans had never answered. *Id.* Mr. Evans was also ordered to clarify his answer to
24 Mr. Helling's Interrogatory No. 5 and to respond fully to Mr. Helling's Interrogatories 16, 18, 19, 20,
25 and 21. *Id.* If Mr. Evans failed to comply with the court's order, defendants had leave to file a motion
26 for further sanctions. *Id.* Due to Mr. Evans's failure to comply with discovery, the court was
27 constrained to grant another extension of the deadline to file dispositive motions. *Id.* On January 4,
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1 2011, this court granted Mr. Evans's motion substituting himself *in pro se* in place of Mr. Boles (#193).²

2 Following the December 1, 2010 hearing, Mr. Simon had no further communications with Mr.
3 Boles. Instead, Mr. Evans wrote directly to Mr. Simon on December 8, 2010, presumably because both
4 he and Mr. Boles consented to direct communications with Mr. Simon, as had been the practice in
5 August 2010. Mr. Evans advised that he had understood that pursuant to their agreement in August, Mr.
6 Evans was only required to respond to one set of defendants' interrogatories and the request for
7 production of documents (#190-1, Ex. C). Mr. Evans also sought guidance from Mr. Simon about what
8 the court ordered Mr. Evans to do at the December 1, 2010 hearing. *Id.* On that same day, Mr. Simon
9 responded by forwarding copies of his motion to compel, and he clarified that the agreement concerning
10 duplicate interrogatories was not intended to excuse Mr. Evans from responding at all (#190-1, Ex. D).
11 Mr. Simon declined to offer Mr. Evans legal advice concerning the court's order and reminded Mr.
12 Evans that discovery responses were due that day. *Id.* Mr. Evans responded that he would have his
13 discovery responses completed by December 9, 2010, one day late (#190-1, Ex. E).

14 On December 9, 2010, Mr. Evans provided his responses to the outstanding discovery (#190-1,
15 Ex. F). Mr. Evans supplemented his answers to Mr. Helling's interrogatories, and responded to all
16 seventeen outstanding requests for production, stating that he has no records whatsoever from May 2007
17 through August 2008, the period during which he represented Mr. Witherow and during which time the
18 defendants allegedly intercepted attorney-client communications. *Id.* In response to Messrs. Sklonik
19 and Henley's outstanding interrogatories, Mr. Evans responded as follows:

20 Note: Pursuant to discussions with counsel, Plaintiff Evans offers that
21 the responses to the Interrogatories from Skolnik and Henley will be the
22 same as the responses to the Interrogatories to Donat³ and Helling and
23 therefore Plaintiff Evans offers those Answers to Interrogatories as the
24 same answers to the same Interrogatories from Defendants Skolnik and
25 Henley.

25 ²For the period August 2010 until January 4, 2011, when Mr. Evans substituted himself in *pro*
26 se, Mr. Evans apparently consented, with Mr. Boles's approval, to have direct communications with Mr.
27 Simon. This occurred sporadically, but the record is clear that after the December 1, 2010 hearing, Mr.
28 Evans communicated directly with Mr. Simon.

27 ³The court has not reviewed Mr. Evans's answers to Mr. Donat's interrogatories.

1 to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5)
2 the availability of less drastic sanctions.” *Connecticut General Life Ins. Co. v. New Images of Beverly*
3 *Hills*, 482 F.3d 1091, 1096 (9th Cir. 2007). “The subparts of the fifth factor are whether the court has
4 considered lesser sanctions, whether it tried them, and whether it warned the recalcitrant party about the
5 possibility of case-dispositive sanctions.” *Id.* This is not a mechanical test, but is intended to provide
6 the court with a framework to think about what it should do. *Id.*

7 Before analyzing whether a case-dispositive sanction is warranted in this case, the court must
8 consider what exactly Mr. Evans did or did not do in response to the December 1, 2010 order. Mr. Evans
9 supplemented his discovery one day late, on December 9, 2010, and he blames his tardiness on his
10 attorney for failing to communicate anything to him about the status of the case and on the Clerk’s
11 Office because the order was not docketed until December 8, 2010 (#192, page 3, lines 6-28).
12 Communication with one’s attorney is a two-way street, and it is evident that Messrs. Evans and Boles
13 both consistently abdicated their responsibilities in this action. As for the delay in docketing the
14 December 1, 2010 order, had Mr. Evans made a cursory review of the docket sheet, he would have
15 learned that defendants filed a motion to compel and perhaps he would have read what it said. He would
16 have also learned that a hearing had been set on December 1, 2010, and that Mr. Boles had failed to
17 respond to the motion. In addition, Mr. Evans could have asked for a one-day extension of the court’s
18 December 1, 2010 order, but he did not. Mr. Evans’s excuses are without merit, and he disobeyed the
19 court’s order.

20 Now to the discovery responses. The court ordered Mr. Evans to respond to outstanding requests
21 for production of documents and deemed any objections waived (#188). Since Mr. Evans had earlier
22 interposed attorney-client privilege and confidentiality concerns to the requested documents, logic
23 dictates that he had, in fact, reviewed documents in his possession and determined such objections were
24 well taken, as opposed to frivolous or untrue. Understandably, it came as a surprise to Mr. Simon on
25 December 9, 2010, when Mr. Evans responded to every single document production request with the
26 news that he had not one piece of paper responsive to any of the requests. Nevertheless, Mr. Evans
27 responded to the court’s order, and he will live with the consequences of having no written or
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documentary evidence of an attorney-client relationship with Mr. Witherow from May 2007 through August 2008 – a span of fifteen months.

On December 1, 2010, the court also ordered Mr. Evans to confirm whether his answer to Mr. Helling's Interrogatory No. 5 was complete, and to respond more fully to Mr. Helling's Interrogatory Nos. 16, 18, 19, 20, and 21. *Id.* He did so, albeit one day late.

The heart of defendants' motion for case-terminating sanctions concerns Mr. Evans's answers to Messrs. Sklonik and Henley's interrogatories. Mr. Henley asked twenty-three interrogatories, and Mr. Sklonik asked fifteen (#184, Ex. C & D). Both Mr. Simon and Mr. Evans agree that in August 2010, the two discussed the interrogatories and agreed that to the extent an answer to one interrogatory posed by one defendant was identical to the answer to another defendant, Mr. Evans could refer to the first answered interrogatory. This is reasonable and saves time and paper. However, this is not remotely what Mr. Evans did. Mr. Evans actually only answered interrogatories posed to Mr. Helling, and these answers were, in part, the basis of defendants' motion to compel because his answers were incomplete and referred to other answers that did not address information sought by a specific interrogatory.⁵ The

⁵For example, Mr. Helling's Interrogatory No. 5 and Mr. Evans's response is as follows:

INTERROGATORY NO. 5

Identify with specificity each and every fact supporting your allegation that Defendants "required authorization for interception and eavesdropping on Plaintiffs' confidential attorney/client telecommunications" as alleged in your First Amended Complaint. (Docket #33, p. 7, ¶ 34).

ANSWER TO INTERROGATORY NO. 5

The Nevada Revised Statutes require that Defendants obtain Court order prior to Intercepting Plaintiff Evans' phone calls, especially those phone calls between Plaintiff Evans and his clients. *****ADD MORE*****

Mr. Helling's Interrogatory No. 16 and Mr. Evans's response was:

INTERROGATORY NO. 16

Identify with specificity each and every fact supporting your allegation that Defendants "acted with deliberate indifference or reckless disregard for Plaintiffs clearly established statutory and constitutional rights" as alleged in your First Amended Complaint. (Docket #33, p. 9, ¶ 41).

1 court ordered Mr. Evans to supplement and/or clarify certain of his answers to Mr. Helling's
2 interrogatories on December 1, 2010, and he belatedly did so.

3 As for his answers to Messrs. Skolnik and Henley's interrogatories, Mr. Evans abandoned any
4 pretense of the customary protocol for answering interrogatories in favor of a slapdash – and utterly
5 unhelpful – approach. Mr. Evans did not bother to state the individual interrogatories posed by Messrs.
6 Skolnik and Henley, nor did he go to the trouble to provide specific answers or, for example, refer Mr.
7 Simon to an answer to be found in his answers to Mr. Helling's interrogatories. He simply answered
8 all thirty-eight interrogatories with one expansive two-sentence statement he characterized as a "note,"
9 which the court has already quoted *verbatim* in the procedural history of this order. Translated, Mr.
10 Evans appears to be saying, "Whatever I said in my answer to Mr. Helling's interrogatories – regardless
11 of whether they are same questions, different questions, or whatever – my answers are all the same for
12 everyone." As the court discusses in detail below, the defendants' three sets of interrogatories were not
13 identical at all; in fact, each defendant asked discrete questions on very different topics related to this
14 case.

15 Of course, Mr. Evans's answers to Messrs. Skolnik and Henley's interrogatories are not only
16 improper, they are useless. In opposition to the motion for terminating sanctions, Mr. Evans does not
17 trouble himself with an analysis of Ninth Circuit cases that address the very issue of dispositive
18 sanctions; instead, he blames Mr. Simon, Mr. Boles, and the Clerk's Office. Mr. Evans blames Mr.
19 Simon because, according to Mr. Evans, they agreed that this response to discovery was perfectly
20 acceptable. Having reviewed the papers in this case, the court does not find this excuse plausible. No
21 competent lawyer would find Mr. Evans's two-sentence "note" to be an acceptable response to answers
22 to interrogatories. Next, Mr. Evans contends that Mr. Simon waived the defendants' right to any
23 discovery responses because Mr. Simon did not ask about the discovery during Mr. Evans's deposition
24 last fall. Not surprisingly, Mr. Evans cites no citation to any legal authority for the proposition that if

26 ANSWER TO INTERROGATORY NO. 16

27 See Answer to Interrogatory Nos. 6, 8, 9, 10, 11, 12, and 13.

1 a lawyer takes a party's deposition, the right to insist on responses to written discovery is waived. That
2 is because none exists.

3 Next, Mr. Evans's blames his former attorney, Mr. Boles. Mr. Evans complains that Mr. Boles,
4 never called, never wrote, never communicated with him. In fact, Mr. Evans had no inkling that
5 defendants had filed a motion to compel, that it was set for hearing, and that his attorney failed to oppose
6 it. The court has three comments. First, Mr. Evans hired Mr. Boles and, being an attorney himself, is
7 well aware of Mr. Boles's legal skills. Second, Mr. Evans practices in federal court himself, and is well
8 versed in PACER; therefore, he has unfettered access to the docket sheet in his own case. Third, Mr.
9 Boles's failure to adequately represent Mr. Evans's interest in this case is no excuse. Mr. Boles's
10 conduct does not immunize Mr. Evans from the consequences of his lawyer's inaction or misconduct.
11 *Link v. Wabash R.Co.*, 370 U.S. 626 (1962); *Malone v. U.S. Postal Service*, 833 F.2d 128, 134 (9th Cir.
12 1987); *In re Hill*, 775 F.2d 1385 (9th Cir. 1985).

13 Finally, Mr. Evans blames the Clerk of Court for not posting the December 1, 2010, order on its
14 electronic filing system, PACER, until December 8, 2010. Had Mr. Evans been interested in the status
15 of his case, he could have checked PACER, which would have revealed the motion, the hearing, and the
16 fact that his attorney filed no opposition to the motion to compel. Apparently, Mr. Boles did not
17 consider the sanction order a "big order," even when Mr. Evans called to ask him about it, *See* #192,
18 page 3, lines 18-28. The disconnect was between Mr. Boles and Mr. Evans, and no one else.

19 The court finds that Mr. Evans violated its December 1, 2010 order by failing to provide the
20 delinquent discovery by the deadline of December 8, 2010. The court also finds that Mr. Evans violated
21 the court's order by failing to adequately answer Messrs. Sklonik and Henley's interrogatories. To
22 decide whether dispositive sanctions are warranted, the court relies on the Ninth Circuit's five-part test.
23 *Connecticut General*, 482 F.3d 1091 at 1096. This court is mindful that "Rule 37(b)(2) contains two
24 standards – one general and one specific – that limits a district court's discretion. First, any sanction
25 must be 'just;' second, the sanction must be specifically related to the particular 'claim' which was at
26 issue in the order to provide discovery." *Ins. Corp of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*,
27 456 U.S. 694, 707 (1982); *see also, Navellier v. Sletten*, 262 F.3d 923, 947 (9th Cir. 2001).

1 **1. *The public's interest in expeditious resolution of litigation***

2 This case has been pending since June 25, 2008, two years and eight months. Pursuant to the
3 Civil Justice Reform Act, this case will be reported as a three-year case on September 30, 2011, unless
4 it is concluded through dispositive motion or trial. This factor weighs in defendants' favor.

5 **2. *The court's need to manage its docket***

6 The court held its first case management conference in this case on November 18, 2008, and
7 suspended a scheduling order until all parties were added (#27). On January 7, 2009, the court ordered
8 the parties to file a discovery plan and scheduling order on February 17, 2009 (#41). On February 20,
9 2009, the court approved the discovery plan and scheduling order, but cautioned that, given the delays
10 in this case, no extensions of discovery would be granted (#55). Discovery was to be completed by
11 October 23, 2009. *Id.* In the interim, suffice it to say that there were numerous dispositive and non-
12 dispositive motions, parties added and then dismissed, substitutions of counsel (Mr. Evans did so three
13 times), requests by one party or another to stay discovery, and numerous amendments to complaints.
14 When the dust finally settled in June 2010, the court issued what it hoped would be a final discovery
15 plan and scheduling order (#164). That hope was in vain. The court issued one final – truly final –
16 scheduling order that discovery would end October 28, 2010, and dispositive motions were due
17 December 28, 2010 (#175). Defendants filed their motion to compel concerning Mr. Evans's
18 outstanding discovery, which resulted in additional delays. Dispositive motions are now due March 22,
19 2011, only six months before this case is reportable as a three-year case (#199). This factor weighs in
20 defendants' favor.

21 **3. *The risk of prejudice to the party seeking sanctions***

22 Messrs. Skolnik and Henley are entitled to conduct written discovery, and they are entitled to
23 actual answers to interrogatories. Neither they, nor their attorney, are required to review Mr. Helling's
24 answers, discern which of these might also correspond with Mr. Evans's "note" that whatever he said
25 to one defendant is what he would say to another defendant. This is especially true when the questions
26 posed by one defendant are not the same questions posed by another. This is why Fed.R.Civ.P. 33
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1 outlines exactly how to answer interrogatories. Mr. Evans did not remotely do this. His conduct has
2 greatly prejudiced Messrs. Skolnik and Henley. This factor weighs in favor of defendants.

3 **4. The public policy favoring disposition of cases on their merits**

4 The court harbors faint hope that this case may someday end and heartily believes public policy
5 would be advanced if this case is decided. At this point, the court's interest in whether it is decided on
6 the merits or otherwise is waning, but acknowledges that it is better for cases to be decided on the merits.
7 This factor weighs in Mr. Evans's favor.

8 **5. The availability of less drastic sanctions**

9 As to the fifth factor, the court must consider three sub-parts: (1) whether the court has
10 considered lesser sanctions; (2) whether it tried them; and (3) whether it warned the recalcitrant party
11 of the potential for case-ending sanctions. *Connecticut General*, 482 F.3d 1091, 1096. The court has
12 considered lesser sanctions and believes that Rule 37(b)(2) offers alternatives to the case-ending
13 sanctions Mr. Simon requests. The second factor looks to prior sanctions. The court ordered Mr. Evans
14 to answer the discovery and awarded defendants' their attorney's fees for bringing the motion to compel.
15 Although it did not get Mr. Boles's attention, it did get Mr. Evans's, but not entirely. He provided
16 supplemental answers to Mr. Helling's interrogatories, and made the startling disclosure that although
17 he must have once believed he had documents responsive to requests for production, he either no longer
18 has them or never did. As for interrogatory answers for Messrs. Sklonik and Henley, the sanctions
19 proved no motivation to answer meaningfully at all. The third factor concerns whether the court warned
20 Mr. Evans, through Mr. Boles, that case-terminating sanctions were a possibility if he failed to do what
21 the court ordered on December 1, 2010. Although the court told Mr. Boles that more sanctions would
22 be forthcoming if Mr. Evans failed to obey the court's order, the court did not use the term "case-
23 dispositive sanctions" at the hearing.

24 Having reviewed the three subparts of the fifth factor, the court concludes that Mr. Evans
25 disobeyed this court's order because he did not meet the December 8, 2010 deadline. This alone does
26 not warrant case-ending sanctions, and even defendants would no doubt agree. Then there is the matter
27 Mr. Evans's incomplete and useless answers to Messrs. Skolnik and Henley's interrogatories. The court
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1 finds it too extreme to sanction Mr. Evans with dismissal of his case, and there are less drastic sanctions
2 available.

3 The court now turns to Messrs. Helling, Sklonik, and Henley's interrogatories and discusses them
4 in detail.

5 **A. Mr. Helling's Interrogatories**

6 Mr. Helling's interrogatories focused on facts supporting the legal bases for Mr. Evans's claims
7 (#184-2, Ex. E), and they fall into these categories:

- 8 (1) identification of federal and state statutes prohibiting the conduct alleged
9 (Helling Int. Nos. 1, 9 & 17);
- 10 (2) policies and procedures Mr. Sklonik implemented to eavesdrop on protected
11 attorney-client communications (Helling Int. No. 2);
- 12 (3) identification of each due process violation and facts that support that claim
13 (Helling Int. Nos. 11 & 12);
- 14 (4) identification of facts supporting Mr. Evans's allegation that defendants used
15 "information gleaned" from attorney-client communications and what that
16 information was (Helling Int. Nos. 3 & 4);
- 17 (5) identification of facts to support Mr. Evans's allegation that defendants "required
18 authorization for interception and eavesdropping on Plaintiffs' confidential
19 attorney/client telecommunications" (Helling Int. No. 5);
- 20 (6) identification of facts supporting Mr. Evans's allegation that defendants acted
21 intentionally, recklessly or with deliberate indifference of state and federal laws
22 and Mr. Evans's statutory and constitutional rights (Helling Int. No. 6);
- 23 (7) identification of facts supporting Mr. Evans's claim that defendants' actions were
24 not tailored to advance legitimate or reasonable penological goals (Helling Int.
25 No. 7);
- 26 (8) identification of every constitutional right allegedly violated and every liberty or
27 property interest allegedly Mr. Evans was deprived of (Helling Int. Nos. 8, 13
28 & 17);
- (9) identification of facts supporting the allegation that defendants require a
judicially approved search warrant to monitor outgoing phone calls (Helling Int.
No. 10);
- (10) identification of all harm and injuries Mr. Evans suffered and/or continues to
suffer as a result of defendants' conduct as alleged in the complaint (Helling Int.
Nos. 14 & 15);

- (11) identification of facts supporting Mr. Evans's allegations that defendants acted with deliberate indifference or reckless disregard for Mr. Evans's statutory and constitutional rights (Helling Int. No. 16); and
- (12) identification of past or present emotional and physical injuries Mr. Evans suffered as a result of defendants' alleged conduct (Helling Int. Nos. 18, 19, 20, & 21)

Mr. Evans may proceed to admit evidence related to these legal and factual issues, and proceed with his claims to the extent they relate factually and legally to his answers to Mr. Helling's interrogatories.

B. Mr. Skolnik's Interrogatories

Mr. Skolnik's interrogatories do not duplicate Mr. Helling's; instead, they focus on the allegedly intercepted phone calls. (#184-1, Ex. C). Skolnik Interrogatory No. 1 is the pivotal interrogatory from which the succeeding interrogatories flow: "Identify by date, time, and length each and every phone call between you and Plaintiff John Witherow that you allege Defendants intercepted between May 1, 2007 and August 31, 2008 as alleged in your First Amended Complaint...." *Id.* The remaining interrogatories can be categorized as follows:

- (1) Provide details about the phone calls, such as the persons on the phone calls, the time spent on personal matters, and the topics of personal conversations (Skolnik Int. Nos. 2, 3, & 4);
- (2) Identify all attorney-client communications exchanged during the phone calls, the names of all lawsuits that were pending between the dates in question, as well as the case name and number of those lawsuits, the allegedly intercepted information that was used to the plaintiffs' detriments in any lawsuit, and the outcome of each matter (Skolnik Int. Nos. 5, 6, 7, 8 & 15);
- (3) Explain why Mr. Evans believes defendants intercepted alleged attorney-client phone calls and which defendants intercepted the phone calls (Skolnik Int. Nos. 9 & 10);
- (4) Explain whether Mr. Evans each call Messrs. Witherow and Evans had during the period in question began with a pre-recorded message that all phone calls are monitored or recorded and whether Mr. Evans head this message (Skolnik Int. Nos. 11 & 12); and
- (5) State all facts on which Mr. Evans bases his claim that phone calls during the stated time period were or were not being monitored (Skolnik Int. Nos. 13 & 14).

The Skolnik interrogatories are not duplicative of Mr. Helling's, and Mr. Evans did not answer them when they became due, after Mr. Simon filed his motion to compel, or after the court ordered Mr. Evans to do so. Pursuant to Rule 37(b)(2)(i) and (ii), Mr. Evans is prohibited from introducing the

1 subject matter of these interrogatories into evidence to support his claims or oppose defendants, and the
2 court deems established those facts that Mr. Skolnik sought to establish by these interrogatories.

3 **C. Mr. Henley's Interrogatories**

4 Just as Mr. Skolnik's interrogatories did not duplicate Mr. Helling's, the same is true for Mr.
5 Henley's, although there appears to be some overlap between Messrs. Henley and Skolnik (#184-1, Ex.
6 D). Mr. Henley's interrogatories can be summarized as follows:

- 7 (1) Identification of every person who may have personal knowledge of facts alleged
8 in Mr. Evans's complaint (Henley Int. No 1);
- 9 (2) Identify every act and/or omission by Mr. Henley that supports Mr. Evans's
10 claims and every fact supporting the claim that Mr. Henley intercepted the phone
11 calls in question (Henley Int. Nos. 2 & 7);
- 12 (3) Identify every and/or omission by Mr. Skolnik that supports Mr. Evans's claims
13 and every fact supporting the claim that Mr. Skolnik intercepted the phone calls
14 in question (Henley Int. Nos 3 & 8);
- 15 (4) Identify every act and/or omission by Mr. Helling that supports Mr. Evans's
16 claims and every fact supporting the claim that Mr. Helling intercepted the phone
17 calls in question (Henley Int. Nos. 4 & 9);
- 18 (5) Identify every act and/or omission by William Donat that supports Mr. Evans's
19 claims and every fact supporting the claim that Mr. Donat intercepted the phone
20 calls in question (Henley Int. Nos. 5 & 10);
- 21 (6) Identify every act and/or omission by Lea Baker that supports Mr. Evans's claims
22 and every fact supporting the claim that Ms./Mr. Baker intercepted the phone
23 calls in question (Henley Int. Nos. 6 & 11);
- 24 (7) Identify cases in which Mr. Evans represented Mr. Witherow during the period
25 in question, how and when Mr. Evans first learned of the alleged intercepted
26 phone calls, evidence to support the claim that attorney-client communications
27 were intercepted and recorded, and evidence that defendants were monitoring
28 these communications (Henley Int. Nos. 12, 13, 14, & 15);
- (8) Identify when Mr. Evans employed Mr. Witherow as a paralegal or legal
researcher, the names of individuals, organization, or companies whom Mr.
Witherow referred to Mr. Evans as potential clients, and the names and case
numbers for lawsuits that Mr. Evans filed on behalf of such clients from 1999 to
the present (Henley Int. Nos. 16, 17, 18, & 19);
- (9) Identify how Mr. Evans recorded his billable time in representation of Mr.
Witherow during the period in question (Henley Int. No. 20); and
- (10) Identify monetary gifts, payments or transfers from Mr. Evans to Mr. Witherow's
inmate account or any other account for Mr. Witherow's benefit, and whether

1 such payments compensated Mr. Witherow for legal work and/or for referring
2 clients to Mr. Evans (Henley Int. Nos. 21, 22, & 23).

3 As with Mr. Skolnik's interrogatories, Mr. Henley's cover different topics that those posed by
4 Mr. Helling. Mr. Evans never answered these interrogatories either; therefore, pursuant to Rule
5 37(b)(2)(i) and (ii), Mr. Evans is prohibited from introducing the subject matter of Mr. Henley's
6 interrogatories to support his claims or to oppose defendants, and the court deems established those facts
7 that Mr. Henley sought to establish by these interrogatories.

8 Notwithstanding this order, the deadline for the filing of dispositive motions shall not be
9 extended. As noted in the court's January 26, 2011 order, dispositive motions shall be filed no later than
10 March 22, 2011.

11 **III. Conclusion**

12 Based on the foregoing, and for good cause appearing, defendants' motion for terminating
13 sanctions (#190) is **DENIED**. However, Fed.R.Civ.P. 37(b)(2) affords the court the ability to fashion
14 sanctions that are just and that specifically relate to the claims at issue at the December 1, 2010 hearing
15 as set forth in the order that followed (#188).

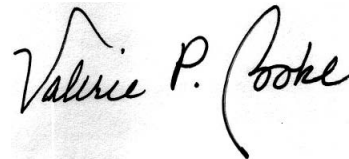
16 **THEREFORE, IT IS ORDERED** as follows:

17 1. Pursuant to Fed.R.Civ.P. 37(b)(2)(i) and (ii), Mr. Evans is prohibited from introducing
18 the subject matter of Mr. Henley's interrogatories to support his claims or to oppose defendants, and the
19 court deems established those facts that Mr. Henley sought to establish by these interrogatories; and

20 2. Pursuant to Rule 37(b)(2)(i) and (ii), Mr. Evans is prohibited from introducing the subject
21 matter of the Skolnik interrogatories into evidence to support his claims or oppose defendants, and the
22 court deems established those facts that Mr. Skolnik sought to establish by these interrogatories.

23 IT IS SO ORDERED.

24 DATED: February 3, 2011.



25 UNITED STATES MAGISTRATE JUDGE